IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RASHEED WHITE, Appellant.	No. 37263-1-II PART PUBLISHED OPINION

Van Deren, C.J.—Rasheed White appeals his conviction for attempted second degree child rape, arguing that the evidence was insufficient to support his conviction.[1] We affirm.

FACTS

On Saturday, May 12, 2007, at about 2:00 pm, 13 year old A.C.[2] went to Ricardo Mendoza's house to watch television. A.C., who is seven years younger than Mendoza, went to Mendoza's house approximately four times per week. In the late afternoon or early evening of May 12, Mendoza's mother's boyfriend, Vinnie, and his son[3] arrived at Mendoza's house, accompanied by White. White, age 30, had been drinking and continued to drink a 40-ounce

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[1] Additionally, White contends that the trial court erred by denying his motion to suppress his custodial statements to police while intoxicated. We address this argument in the unpublished portion of our opinion.

[2] We refer to minor victims by their initials to protect their rights under RCW 7.69A.030(4).

[3] The record does not contain the last name of Vinnie or the name of his son.

bottle of beer after he arrived.

As he often did, A.C. went into Mendoza's mother's bedroom and watched television while sitting on the bed. At some point during the evening, Mendoza and Vinnie's son went to the store, leaving White and Vinnie watching television in the living room.[4] After they left, White walked into the bedroom and closed the door. He walked over to A.C., grabbed A.C.'s buttocks through his clothes, placed his penis within six inches of A.C.'s face, and told A.C. to perform oral sex on him. A.C. refused twice and, when he tried to leave the room, White punched him in the face. A.C. tried to leave the room again and White punched him in the face again. A.C. returned to the bed and White eventually left the bedroom.

After White left the bedroom, A.C. opened the window, jumped out, and ran home, leaving his shoes and his bicycle behind. He told his mother what had happened and called the police. Deputy Elizabeth Sekora of the Pierce County Sheriff's Department responded to the call and spoke with him for approximately 20 minutes. A.C. complained that his face was sore and Sekora noticed that A.C's right cheek was red.

Mendoza came home a few minutes after A.C. had jumped out of the window. When he realized A.C. was gone, he asked White what had happened. White told him that A.C. tried to attack him. Mendoza did not believe White's story because A.C. was not very strong. Mendoza was also concerned that A.C. left without his shoes.

After interviewing A.C. at his home, Sekora, along with officer, Pierce County Deputy

[4] The record is unclear whether Vinnie remained in the house but A.C. testified, "I don't think anybody else was home." 5 RP at 138.

Sheriff Reigle,[5] went to Mendoza's house.[6] When Sekora and Reigle entered Mendoza's house, they saw a man passed out on the living room couch. Mendoza identified the man as White, who matched the description A.C. had given Sekora. It was "obvious" to Sekora that White had been drinking. 5 Report of Proceedings at RP at 215. Sekora attempted to awaken White by calling to him and prodding him. He was not responsive but Sekora was finally able to rouse him by calling him by his first name, "Rasheed."[7] RP at 214. Sekora arrested White and placed him in handcuffs. He had no trouble walking out of the house to the patrol car and then Sekora advised him of his *Miranda*[8] rights. When Sekora asked White if he understood those rights, he answered affirmatively.

White denied that he knew A.C. or that he had asked A.C. to perform oral sex. He said that an underage girl had started to engage in oral sex with him but he had stopped her because of her age. White did not slur his words and Sekora could clearly understand everything he was saying.

The State charged White with one count of attempted second degree child rape. The

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[5] The record does not contain Deputy Reigle's first name.

[6] Mendoza's version of White's arrest differed from Sekora's. Mendoza testified that A.C. walked with him back to his house and that three or four police officers entered the house. Sekora testified that she drove A.C. to Mendoza's house and that she and Deputy Reigle were the only officers present. But Mendoza also testified that he took daily medication following his stay at Western State Hospital and that he forgot to take his medication on the day he testified. Furthermore, he admitted to having a poor memory.

[7] Mendoza testified that White was "passing in and out every time [Sekora] said his name, and they shook him, and so they, like, got him up." 5 RP at 201. "[White] just looked like he was dizzy and falling asleep." RP at 202.

[8] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

State later amended the information to add that White was on community custody when he committed the crime.

At trial, after the State rested, defense counsel moved to dismiss the charge against White. Defense counsel argued that the State's evidence was insufficient for a reasonable jury to convict White of attempted second degree child rape. The trial court denied the motion, ruling that the evidence, viewed in the light most favorable to the State, established that White had taken substantial steps toward committing the offense.

The jury found White guilty as charged. He appeals.

ANALYSIS

Sufficiency of Evidence

White contends that his conviction for attempted second degree child rape must be reversed because sufficient evidence does not support it. He argues that "[b]ecause the alleged crime was not completed, this case was not just about credibility, it was about intent and a substantial act toward completing the crime." Br. of Appellant at 7. Specifically, he argues that "propositioning A.C. while possibly placing his hand on A.C.'s backside over his clothes" does not constitute a substantial step toward committing the rape but, rather, shows mere preparation. Br. of Appellant at 9. As such, he argues, "It is possible that, absent the involuntary confession,[9] the jury could have found that White did not form the requisite intent to commit the crime." Br. of Appellant at 7. But criminal intent "may be inferred from all the facts and circumstances" and we disagree that this was a close case that turned on whether White could form the requisite

[9] White did not confess to attempted sexual contact with A.C. In fact, he denied knowing A.C. This reference in the brief appears to be a misstatement of his claim that the trial court erred in admitting his custodial statements.

intent. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

"Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim that evidence is insufficient "'admits the truth of the State's evidence' and all reasonable inferences." *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We view both circumstantial and direct evidence as equally reliable and we "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence." *Thomas*, 150 Wn.2d at 874-75.

RCW 9A.44.076 provides that "[a] person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim."[10] The legislature defined sexual intercourse as, among other things, "any act of sexual contact between persons involving the sex organs of one person and the mouth . . . of another whether such persons are of the same or opposite sex." RCW 9A.44.010(1)(c).[11]

"A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). The trier of fact may infer the intent to commit a crime "from all the facts

[10] A.C. is not married to White.

[11] "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

and circumstances." *Bencivenga*, 137 Wn.2d at 709. "A 'substantial step' is conduct strongly corroborative of the actor's criminal purpose." *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 539, 167 P.3d 1106 (2007) (quoting *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), *cert. denied* __ U.S. __, 128 S. Ct. 1098, 169 L. Ed. 2d 832 (2008). White argues that his only overt sexual acts were propositioning A.C. and touching A.C.'s buttocks. But the State correctly notes that we look at "substantial steps" rather than "overt acts." Br. of Resp't at 20; RCW 9A.28.020(1); *see also* 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02, at 386-88 (3d ed. 2008).

An attempt must be more than "[m]ere preparation to commit a crime." *Townsend*, 147 Wn.2d at 679. "Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime." *State v. Price*, 103 Wn. App. 845, 852, 14 P.3d 841 (2000). "[A]n attempt conviction does not depend on the ultimate harm that results or on whether the crime was actually completed." *State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006).

In *State v. Sivins*, 138 Wn. App. 52, 64-65, 155 P.3d 982 (2007), Division Three of our court held that a man took substantial steps toward second degree child rape when, after sending sexual requests over the Internet to a police intern whom he believed to be a 13 year old girl and enticing her with promises of pizza and vodka, he drove several hours and rented a motel room in her home town. The *Sivins* court characterized the defendant's Internet communications as evidence of his intent and his subsequent travel and motel rental as the substantial steps. 138 Wn. App. at 64.

Similarly, in *Townsend*, our Supreme Court held that there was sufficient evidence for conviction of attempted second degree child rape where the defendant contacted a Spokane police detective, whom he believed to be a 13 year old girl, over the Internet; asked for sexual intercourse; arranged to meet in a hotel room; and traveled to that hotel room. 147 Wn.2d at 670-71, 679. This case presents even more persuasive evidence of attempted second degree rape of a child.

White argues that, like the Internet communications in *Sivins*, his actions only constitute propositioning A.C. for oral sex and that he took no substantial step. He suggests that the facts here are analogous to a hypothetical, noncriminal situation where a man approaches a woman at a bus stop and says that he would like to have sex with her but, after she declines, he takes no further actions except to continue to stand next to her. We reject this analogy.[12]

Here, like *Sivins*, White asked his victim to provide sexual gratification. Whereas *Sivins* involved a sting operation that precluded contact with a child, 138 Wn. App. at 64, White actually entered the bedroom, closed the door, put a knee on the bed, unzipped his pants, took out his penis, presented it to A.C., grabbed A.C.'s buttocks, and leaned to within six inches of A.C. with his penis exposed. Then White told A.C. to perform oral sex on him—not once, but twice. Not all of these steps are necessary to constitute a substantial step in attempting second degree child rape but White's actions clearly evidence conduct "strongly corroborative of [his] criminal purpose." *Borrero*, 161 Wn.2d at 539.

When viewed in the light most favorable to the State, White took more than one

[12] White's analogy involves consenting adults without touching, positioning, or exposing genitals, unlike the facts here. Furthermore, the man at the bus stop does not confine his victim or demand sexual gratification.

substantial step toward second degree child rape. Thus, the State's evidence was sufficient to convict White of attempted second degree child rape.

We affirm.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

FACTS RELATING TO UNPUBLISHED PORTION OF OPINION

The trial court held a CrR 3.5 hearing to determine whether White had voluntarily waived his *Miranda* rights before making custodial statements to Sekora. Sekora testified as set out above. She read White the *Miranda* warnings from her "rights card in [her] pocket that [she] always use[d]." 4 RP at 90. She said that White responded in the affirmative that he both understood those rights and wished to talk to her. Sekora did not make any promises or threats or use coercion to get White to speak to her.

Sekora asked White if he had some interaction with A.C. and White denied knowing A.C. Sekora described A.C. to White but White still said he did not know him. She then asked White whether he asked A.C. to "suck his dick." 4 RP at 94. White paused for several seconds and answered that he had not. Instead, White stated that a slim, brown-haired girl had started to perform oral sex on him and that he had stopped her because she was too young. He also denied asking anyone to "nibble his penis." 4 RP at 94. Sekora testified that she understood White's statements and that he appeared to understand her. He never asked her to clarify any of her questions.

White testified that he had consumed "five bottles of Cisco" the morning of May 12, 2007. He said that he also drank "Old English" and "mass cans of beer" and that he had smoked marijuana that day. 4 RP at 100-01. White said that when the officer arrested him he was sitting on the couch holding a beer, not asleep, but "out of it." 4 RP at 102. Before the officer, who he did not believe was Sekora, arrested him, a "little boy said go ahead and beast it," so he finished his beer. 4 RP at 108. According to White, the officer placed him under arrest, took him to the car, did not read him his *Miranda* rights, and did not ask him any questions. Accordingly, White testified that he gave no statements to the officer.

The trial court found Sekora's version of the events to be credible and White's version not credible. It also found that, although White was intoxicated, he understood his *Miranda* rights and voluntarily waived them before he made statements to the police. Thus, the trial court denied White's motion to suppress the statements.

ANALYSIS

Admission of Custodial Statements

White argues that he was too intoxicated to voluntarily waive his *Miranda* rights and that the trial court erred in ruling otherwise. We disagree.

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Washington Constitution article I, section 9 grants a similar right and its protection is coextensive with that provided by the Fifth Amendment. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

"The State bears the burden of showing a knowing, voluntary, and intelligent waiver of

Miranda rights by a preponderance of the evidence." *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). Our courts have found "[i]mplied waiver . . . where the record reveals that a defendant understood his rights and volunteered information [and] where the record shows that a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights." *State v. Terrovona*, 105 Wn.2d 632, 646-47, 716 P.2d 295 (1986) (footnotes omitted). We also infer a waiver "when a defendant voluntarily discusses the charged crime with police officers and indicates an understanding of his rights." *State v. Ellison*, 36 Wn. App. 564, 571, 676 P.2d 531 (1984).

We evaluate the totality of the circumstances surrounding an interrogation to determine whether the defendant voluntarily gave custodial statements. *Unga*, 165 Wn.2d at 100.

> Circumstances that are potentially relevant in the totality-of-the-circumstances analysis include the "crucial element of police coercion"; the length of the interrogation; its location; its continuity; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation.

Unga, 165 Wn.2d 101 (quoting *Withrow v. Williams*, 507 U.S. 680, 693, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)).

Evidence of intoxication or drug use does not necessarily render a waiver involuntary but it is a factor we consider. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996); *State v. Saunders*, 120 Wn. App. 800, 810, 86 P.3d 1194 (2004). We consider alcohol's normal and possible side effects on the accused and whether it affects his "decisional capacity at the time [he] gave [his] statement." *Aten*, 130 Wn.2d at 664.

In *Aten*, our Supreme Court held that, although the defendant checked into a hospital's

behavioral medicine unit and took medication for depression and anxiety, the trial court properly admitted her confession because "she had no trouble putting words together, her sentences were complete, and she showed no impairment caused by medicine." Moreover, the defendant "appeared calm and alert, and she did not appear to be under the influence of drugs or intoxicants." *Aten*, 130 Wn.2d at 650.

Here, at the CrR 3.5 pretrial hearing, the trial court heard testimony from both Sekora and White regarding his arrest, *Miranda* warnings, and subsequent custodial statements. The trial court entered the following findings of fact:

> 4. [White] was placed in the backseat of [] Sekora's patrol car. [] Sekora then read [White] his Miranda Rights from a prepared card issued by the Pierce County Sheriff's Department.
> 5. [White] did not ask for an attorney and any statements made to law enforcement personnel were made voluntarily and without coercion. No threats or promises were made to [White].
> 6. [White] did not slur his speech and appeared to understand the Deputy's questions and [White's] answers were responsive to the questions he was asked.
> 7. [White] was not so intoxicated that he was unable to understand the Miranda Rights that were read to him.

Clerk's Papers (CP) at 50. Accordingly, the trial court ruled that White's statements "were made after a knowing, voluntary and intelligent waiver of his constitutional rights." CP at 51.

White challenges the trial court's findings that he voluntarily waived his *Miranda* rights and that he was not so intoxicated that he was unable to understand his *Miranda* rights. White also challenges the trial court's conclusion that he gave a valid waiver.

We treat unchallenged findings as verities on appeal. *See State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994). Because "[c]redibilty determinations are for the trier of fact," we

do not review them on appeal. *Thomas*, 150 Wn.2d at 874. And "[w]e will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding." *Athan*, 160 Wn.2d at 380. "'Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'" *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008) (internal quotation marks omitted) (quoting *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002)). We review de novo whether those findings support the conclusions of law. *Grogan*, 147 Wn. App. at 516.

Here, the record contains substantial evidence supporting the conclusion that White's custodial statements were voluntary and that he validly waived his right to remain silent. First, the trial court found Sekora's version of the events credible and White's version not credible.[13] Because we do not review credibility determinations, we accept Sekora's version as true. Sekora's description of what transpired shows that White was awake, able to walk, and able to understand her questions and to respond appropriately without further clarification. And the unchallenged findings are verities on appeal. *Hill,* 123 Wn.2d at 644-45. They establish that Sekora placed White in her patrol car, that White did not ask for an attorney, and that no threats or promises were made to White. The findings also establish that White did not slur his speech

[13] We treat these credibility determinations as findings of fact because "a finding of fact denominated as a conclusion of law will be treated as a finding of fact." *Luther*, 157 Wn.2d at 78.

The State argues that White "failed to support his assignment of error to the trial court's findings of fact with sufficient argument, citations to the record, and citations to authority, [so] this court should treat the assignments as being without legal consequence" and cites *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 244, 877 P.2d 176 (1994), for support. Br. of Resp't at 12. Because White does support his arguments with citations to the record and legal authority, we decline the State's invitation to treat the trial court's findings as verities.

and appeared to understand Sekora's questions and that White's answers were responsive to the questions asked.

The record provides substantial support for the trial court's ruling that White was not so intoxicated that he did not understand the *Miranda* rights and that he voluntarily waived those rights when he made custodial statements.

We affirm.

Van Deren, C.J.

We concur:

Armstrong, J.

Hunt, J.